the defence evidence as to the movements on the 15th of October, but I am satisfied that the accused went shooting and had face ache which persisted till arrest.

Not infrequently there is an excess of caution in identification. Parades are sometimes needlessly held, but in this case when the case for the prosecution rests solely on the evidence of the complainant and he stated there were four attackers of which he only knew three by name, it is surprising that he was not called upon to confirm his report by identification.

In this case there is the evidence of the complainant versus the defence of *alibi*. The injuries suffered by the complainant speak for themselves but were they suffered in the circumstances he testified, or were they the consequence of the quarrel over firewood as stated by the complainant a few hours afterwards in Ex. P6? And can the eyesight of the complainant be relied upon at his age in the middle of the night? The Medical witness (1 P.W.) was not asked and the complainant's sight was never apparently tested.

I think the account in Ex. P6 is more than possible. It is also quite likely that the accused would go bird shooting with friends at Hari Raya, a holiday season. But neither is the prosecution case.

The accused must have the benefit of the doubt.

Before concluding I would like to mention one other point. I consider a Police Inspector should appear in uniform. I am aware that the present Police dress appears very informal and perhaps Inspector Nik Yusoff looked smarter in plain clothes, but Judges robe and Counsel robe and I think the Police might pay the Court the compliment of appearing in the dress worn for ceremonial occasions.

The accused is found not guilty. He is acquitted and discharged.

Case dismissed.

LEE ENG JOO v. KOK BOON KENG & ORS.

[A. C. J. (Thomson J.) May 9, 1949]
[Ipoh — Civil Appeal No. 3 of 1949]

Labour Code (Cap. 154), s. 93 — Contract — Master and servant — Custom of trade.

In this case the only point of substance in dispute between the parties was whether or not an employer in the fish catching business (that is to say in this case the appellant) is entitled to deduct from wages advances made by him to his employees at the commencement of the period of service when the contract of employment is terminated by him and not by them. The Deputy Commissioner for Labour from whose decision this appeal was heard held that there is a custom of the trade whereby when, as in this case, it is the employer and not the employees who terminate the contract of service, the employer is not entitled to deduct advances made by him. He held that the custom was an implied term in the contract of service in the case and decided the dispute before him accordingly.

Held: (1) a custom to be good must be reasonable, certain and notorious; (2) in this case the custom alleged was one which no Court of law could accept or uphold except on very much more detailed and very much stronger evidence than was before the Dy. Commissioner for Labour.

Case referred to:—

(1) *Devonald v. Rosser & Sons,* (1906) 2 K.B.D. 728 at p. 743.

CIVIL APPEAL.

Respondents in person.

Thomson J. : — This is an appeal against an order of the Deputy Commissioner for Labour, Perak, made by him under section 93 of the Labour Code.

A large number of points, some of them of a highly technical nature, were raised by the appellant. I do not, however, propose to deal with these *seriatim* because I have come to the conclusion that there is only one point of substance in dispute between the parties and that is whether or not an employer in the fish catching business (that is to say in this case the appellant) is entitled to deduct from wages advances made by him to his employees at the commencement of the period of service when the contract of employment is terminated by him and not by them. The Deputy Commissioner for Labour held that there is a custom of the trade whereby where, as in this case, it is the employer and not the employees who terminate the contract of service, the employer is not entitled to deduct advances made by him. He held that the custom was an implied term in the contract of service in the case and decided the dispute before him accordingly.

On the evidence as it appears on the record, it is a matter of no small difficulty to ascertain who were the parties to the contract in question and what were its terms.

It is clear, however, that some time in October, 1948, one or more agreements were made to which the present appellant, the respondent Kok Boon Keng and the seventeen other respondents were parties. In effect the Deputy Commissioner decided that there was only one agreement to which the parties were the appellant on the one side and the eighteen respondents on the other side. He took the view that this was a contract of employment, that the appellant was the employer and that the respondents were all labourers employed by him.

On the evidence I am unable to discover any adequate support for this view. The respondent Kok Boon Keng said that the appellant called upon him to provide men but he went on to say that the monies payable under the contract were paid to him and divided by him, apparently in such proportions as he himself saw fit, among the others. The only other respondent who gave evidence agreed that the appellant never had any direct dealings with him. The appellant on the other hand did not admit that he had had contractual relations

with any one save the respondent Kok Boon Keng and stated (though not on oath) that the other respondents were in the employment of Kok Boon Keng and not of himself. I can find nothing in this to support any privity of contract between the appellant and the respondents other than Kok Boon Keng. As far as Kok Boon Keng himself is concerned, it is clear, however, that he was a sub-contractor for labour and therefore a labourer within the meaning of section 93 of the Labour Code.

Having disposed of the question as to who were the parties to the contract, I now turn to the question of what were its terms. On that question the evidence is in a state of great confusion but, nevertheless, on closer examination a certain amount of light can be discerned in the darkness.

The respondent's version of the contract appears to be that he was engaged to catch fish for the appellant on terms contained in a written agreement between the Pangkor Fishermen's Union and certain employers. That written agreement was not produced; its non-production was not accounted for; and no very satisfactory parol evidence was adduced as to its contents. He gave no evidence whatsoever as to the amount of work done under the agreement but admitted that an advance of $3,500 had been made to him at the commencement of the agreement and that if this advance was taken into account, he had in fact been paid by the appellant $1,500 more than he had actually earned.

The appellant's evidence was equally unsatisfactory, but he was quite emphatic that he had no knowledge of the agreement made by the Pangkor Fishermen's Union which was mentioned by the respondent. How he arrived at such a result is difficult to say, but he did arrive at the conclusion that if the advance of $3,500 made by him was taken into account he had overpaid the respondent by $1,620.

I am satisfied that the only possible inference to be drawn from the evidence is that the two parties were attempting to say the same thing in different words. I am driven to the conclusion because of the very great similarity between the results at which each of them arrived by apparently different methods. To account for the discrepancy of $120 which exists is to my mind, at this stage, beyond any mere human competence. Nevertheless, it is a small discrepancy and the only practical course to adopt with regard to it is to disregard it.

And so I come to the position that I stated at the commencement of this judgment that the difference of substance between the parties relates solely to the advance of $3,500 made at the commencement of the contract. In this connection, the Deputy Commissioner held that it was the custom of the fish trade for an employer to give workmen a lump sum of money on engagement so that they could settle with their previous employer, and this custom prescribed that this money was never repaid to the new employer unless the employee left that employer's work of his own accord. He did not say so in terms, but he clearly intended to hold that such custom must be read into the agreement between the two parties in this case.

On this point the Deputy Commissioner may be right. Again, he may be wrong. The question, however, which I have to decide here is whether he had before him sufficient evidence to justify his holding that such a custom existed and was part of the agreement between the parties. I do not think he had. The respondent in evidence said: "If a man leaves his employment, he must repay the advance. If the employer dismisses him, then he need not pay". The appellant gave no evidence on the point at all, but he certainly did not admit the existence of any such custom. The law on the point was clearly stated by Farwell L.J. in the case of *Devonald v. Rosser & Sons*[1]. His Lordship said: "A custom to be good must be reasonable, certain, and notorious". Here in the present case there is not a scrap of evidence to the effect that the custom is notorious. There is no certainty about it except in the terms in which the respondent, and he alone, states it and as far as its being reasonable is concerned I find it difficult to conceive of anything more unreasonable. I may be lacking in understanding but I can only go on the evidence as I see it before me. On that, apparently this so-called custom entitles a man to retain in full any advances made to him by his employer and in no circumstances whatsoever refund them so long as he himself does not leave his employment. Apparently no regard is to be paid to the period of employment, apparently no regard is to be paid to whether or not the employer has good grounds for dispensing with the employee's services. So long as the employee does not leave the employer of his own free will he is entitled to retain the money. That practice may be enshrined in some agreement made by the Pangkor Fishermen's Union. It may well be a custom that is prevalent among fishermen at Pangkor. But it is not a custom that any Court of law can accept or uphold except on very much more detailed and very much stronger evidence than was before the Deputy Commissioner for Labour in this case.

The appeal is accordingly allowed with costs.

I am in some difficulty as to what exact order should be made as to costs in the somewhat peculiar circumstances of the case, but as the proceedings have in effect been conducted throughout by the respondent Kok Boon Keng, I think the interests of justice will be met if judgment for the amount of the taxed costs is entered against him.

Appeal allowed.